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No. 10-786

In the
Supreme Court of the United States

KINGDOM OF SPAIN and
THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
Petitioners,

v.

ESTATE OF CLAUDE CASSIRER,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioners Kingdom of Spain ("Spain") and Thyssen-Bornemisza Collection Foundation ("Foundation") file this supplemental brief pursuant to Rule 15.8 of the Rules of this Court to respond to the brief filed by the Acting Solicitor General on May 27, 2011.

DISCUSSION

With limited citations and brief recitation of the analysis offered by the Ninth Circuit majority, the Acting Solicitor General makes a very bold assertion – this Court should not grant the petition because 28 U.S.C. 1605(a)(3) is a property restitution statute. *See* U.S. Br. 9. If the Court believes that Congress enacted Section 1605(a)(3) merely as a garden-variety property restitution statute – to be applied to eviscerate the presumptive immunity of a foreign sovereign in *any* situation where there is an allegation that property possessed by *that* sovereign was, at *some* time, involved in a violation of international law committed by *another* country, the Court should not grant the petition. The Acting Solicitor General offers little original analysis to support this dramatic departure. If, however, the Court believes that Section 1605(a)(3), like the other exceptions found in Section 1605(a), was intended to strip a sovereign of its immunity only where *it* has committed some *affirmative action* to permit (and warrant) being haled into a federal court to answer for its actions, the Court must grant the petition.

1. Citing *Nemariam v. Federal Democratic Republic of Ethiopia*, 491 F.3d 470, 479 (D.C. Cir. 2007), the

Acting Solicitor General contends that Congress "intended" the Hickenlooper Amendment's exception to the act of state doctrine, 22 U.S.C. 2370(e)(2), to "operate independently from the expropriation to foreign sovereign immunity." U.S. Br. 14. The Acting Solicitor General overstates the importance of *Nemariam*. Neither Spain nor the Foundation disputes that the Hickenlooper Amendment and the FSIA's expropriation exception "operate independently." It is not disputed that the Hickenlooper Amendment curtails the act of state doctrine (a substantive defense) while Section 1605(a)(3) addresses a limitation on haling a foreign sovereign into federal court (jurisdiction). That these legal concepts "operate independently" does not mean that their scopes are not parallel. Both are intended to prevent the untenable policy of requiring sovereigns who have not committed violations of international law to answer for the actions of another sovereign in the courts of a third sovereign. Just as the Hickenlooper Amendment and the act of state doctrine do not apply to Spain or the Foundation – neither committed a violation of international law – the FSIA's expropriation exception was not intended to apply to Spain or the Foundation.

In addition, the Acting Solicitor General ignores persuasive authority that goes one step further. The Fifth Circuit in *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1396 (5th Cir. 1985), properly observed that "Section 1605(a)(3) of the FSIA . . . *parallels* the so-called 'Hickenlooper Exception' to the act of state doctrine . . . . Like the Hickenlooper Exception, Section 1605(a)(3) was intended to subject to United States jurisdiction any foreign agency or instrumentality that has nationalized or expropriated

property without compensation, or that is using expropriated property taken by another branch of the state." *See also FOGADE v. ENB Revocable Trust*, 263 F 3d 1274, 1294 (11th Cir. 2001) (citing *De Sanchez*) *De Sanchez* does not compare the "operation" of Section 1605(a)(3) and the Hickenlooper Amendment, rather, it recognizes that the *intention* and, more importantly, the *scope* of the legal contructs are parallel.

2. Spain and the Foundation contend that international law permits jurisdiction over a foreign state or instrumentality only for conduct that itself violates international law. *See* Pet. 27-28 The Acting Solicitor General asserts that the petitioners "cite no authority for that proposition." U S. Br. 12. The Acting Solicitor General ignores the letter it received from Spain and the Foundation which noted petitioners' inabihty to find *any* legislation or case law outside the United States that would subject a foreign sovereign nation to the jurisdiction of another foreign sovereign's court for the unrelated actions of a third-party sovereign.[1] Spain and the Foundation specifically referenced analogous legislation passed in other jurisdictions – the United Kingdom, Canada, and Australia – that adopts the restrictive theory of

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[1] Willing to go outside the record, the Acting Solicitor General references discussions with counsel for Respondent U S Br 16 The Acting Solicitor General fails, however, to acknowledge a letter sent on May 2, 2011, at the Deputy Solicitor General's invitation, by Spain and the Foundation which discussed the similarities between the Hickenlooper Amendment and the FSIA, as well as the absence of international law allowing courts of one nation to take jurisdiction over a foreign sovereign based on the alleged taking of a third sovereign.

immunity. *See* State Immunities Act of 1978 (United Kingdom), 17 I.L.M. 1123 (1978), State Immunity Act 1982 (Canada), 21 I.L.M. 798 (1982); Foreign States Immunity Act 1985 (Australia), 25 I.L.M. 715 (1985). Like the FSIA, sovereign immunity is *presumed*, subject to limited exceptions. *See id.* Like the FSIA, the above-mentioned laws provide an exception for a sovereign's acts that are "commercial" in nature. *Id.*

In invoking Section 1605(a)(3), Respondent is not, however, attacking a commercial act by Spain or the Foundation. Instead, he is asserting that United States courts have jurisdiction over Spain and the Foundation because of a violation of international law committed by *another* sovereign. The immunity laws of Canada, Australia, and the United Kingdom do not contain an exception that would strip immunity any time there has been a violation of international law, and they certainly do not contain an exception stripping the immunity of one foreign sovereign for the acts of another.

3. The Acting Solicitor General asserts that because the property at issue is "owned or operated" by the Foundation, Spain may "not ultimately be subject to the district court's jurisdiction" and that possibility "significantly diminishes the potential impact on foreign relations of the decisions below." U.S. Br. 16. The Acting Solicitor General ignores Section 1603(a)'s definition of "foreign state" which expressly includes "an agency of instrumentality of a foreign state . . . ." 28 U.S.C. 1603(a). Thus, any dismissal of the Kingdom of Spain should include the Foundation.

4. The Acting Solicitor General asserts the "issues presented in this case" – issues of sovereign immunity

– do not warrant review from this Court. U.S. Br. 22. Citing to numerous FSIA-invoking actions, including *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 466 F. Supp. 2d 6 (D.D.C. 2006), aff'd in part, rev'd in part and vacated in part, 528 F.3d 934 (D.C. Cir. 2008); *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470 (D.C. Cir. 2007), cert. denied, 540 U.S. 877 (2003); and *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006), cert. denied, 547 U.S. 1193 (2006), the Acting Solicitor General contends that this Court need not examine the propriety of stripping a foreign sovereign of its presumptive immunity where it is not alleged to have committed the violation of international law that warrants jurisdiction because such a scenario "do[es] not seem to arise frequently." U.S. Br. 22.

What the Acting Solicitor General fails to acknowledge is that the Ninth Circuit's expansive reading of Section 1605(a)(3) to include *any* sovereign who possesses (or possessed) property that is alleged to have been taken in violation of international law at *some time*, by *another* sovereign creates the opportunity for many other sovereigns to be haled into federal courts. That Spain and the Foundation may have numerous substantive defenses to Respondent's claims (e.g. statute of limitations, act of state doctrine) is cold comfort because the act of stripping a sovereign of its immunity is a punishment akin to sanctions. *See Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2191 (2009) ("Stripping the immunity that foreign sovereigns ordinarily enjoy is as much a sanction as eliminating bilateral assistance or prohibiting export of

munitions.").[2] The Ninth Circuit's interpretation of Section 1605(a)(3) could increase dramatically the number of FSIA cases brought in U.S. courts.

5. If an immunity exception can to be read as a simple property restitution statute, rather than as one of a few enumerated exceptions designed to limit immunity where a sovereign has acted in a way that warrants jurisdiction of U S. courts, the statute itself must state this clearly. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U S. 81, 93 (2007); *Af-Cap, Inc v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1087-88 (9th Cir. 2007) ("In interpreting the FSIA, we first look to the plain meaning of the language employed by

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[2] Left undisturbed, the Ninth Circuit's decision will affect the willingness of foreign nations, including Spain, to engage in cultural, consular, and political activities in the United States for fear of being haled into court to answer for the actions of another sovereign For example, on June 26, 2009, the Russian Federation informed the district court that it "declined] to participate further in this litigation" and "believe(d) this Court has no authority to enter Orders with respect to the property owned by the Russian Federation and in its possession, and the Russian Federation will not consider any such Orders to be binding on it" *Agudas Chasidei Chabad of United States v Russian Fed'n*, 729 F Supp. 2d 141, 144 (D.D C 2010). On July 30, 2010, the district court entered a default judgment against the Russian Federation, ordering it to turn over historical and religious materials long-possessed by Russian archives and libraries *See id. at 148.* In direct response, State-run Russian museums, including the Hermitage in St. Petersburg and the Pushkin Museum of Fine Arts in Moscow, cancelled long-scheduled loans to American institutions *See* Carol Vogel and Clifford J Levy, *Dispute Derails Art Loans From Russia*, N Y Times, Feb 2 2011, at C1. It is evident from the *Chabad* case that other countries see an action against an agency or instrumentality as an attack on the sovereign itself

Congress" (internal quotation marks and citation omitted)). A plain reading of this statute does not support the Acting Solicitor General's broad interpretation. Thus, it falls to this Court to decide whether the Ninth Circuit's interpretation can, and should, stand.

6. The Acting Solicitor General does not dispute that "Congress intended the FSIA to be consistent with international law." *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.)*, 978 F.2d 493, 497-98 (9th Cir. 1992). As noted in the petition, "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law." Pet. 29 (quoting *Interhandel Case* (Switz. v. U.S.), 1959 I.C.J. 6, 27); *see also id.* ("Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."); *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), Judgment, 1989 I.C.J. 15; Restatement (Third) of Foreign Relations law of the United States § 713 cmt. f, § 703 cmt. d. and rep. n.5 (the latter noting that exhaustion of remedies is a precondition for a complaint under numerous international human rights conventions); Second report on Diplomatic Protection, United Nations International Law Commission, U.N. Doc. A/CN. 4/514 (Feb. 28, 2001). Nonetheless, the Acting Solicitor General contends that when Congress drafted the FSIA to comport with international law, it did not intend to require the internationally-recognized principle that a claimant must first exhaust

available remedies where the violation was alleged to have occurred.[3] U.S. Br. 17.

This Court has long acknowledged the general rule that parties must exhaust available remedies before seeking relief from the federal courts. *See, e.g., Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, & n.9 (1938). "[E]xhaustion is 'a rule of judicial administration,' * * * and unless Congress directs otherwise, rightfully subject to crafting by judges."

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[3] The Acting Solicitor General suggests that Congress was mindful of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) when it drafted the FSIA in 1976. U.S. Brief 17. In that case, Cuba, a communist nation, was alleged to have taken property of an American entity in violation of international law. *See Sabbatino*, 376 U.S. at 404-05. This Court noted that in attempting to resolve such an issue, it is proper for the claimant to first exhaust local remedies. *See id.* at 422-23 (recognizing that the "usual method for an individual to seek relief is to exhaust local remedies"). This Court, however found that exhaustion was not appropriate or necessary because Cuba's compensation program was likely "illusory," *id.* at 402, and Cuba's law was "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West," *id.* at 402-03. *See also id.* at 403 (describing Cuban law as "discriminatory, arbitrary and confiscatory").

Respondent has not asserted that exhaustion, a requirement under basic principles of international law, is impossible or unnecessary because a German compensation program would be illusory or because German law is "discriminatory, arbitrary or confiscatory" in nature. (Spain and the Foundation noted in the petition that following World War II, Germany implemented an extensive process to compensate the victims of Nazi persecution, addressing more than four million claims and paying more than DM 72 billion for claims settled. Pet. 29 n.12.) Thus, the concerns expressed in *Sabbatino* are not present here and do not counsel against requiring exhaustion.

Patsy v. Bd. of Regents of Florida, 457 U.S. 496, 518 (1982) (quoting *Myers*, 303 U.S. at 50). Because Congress did not state specifically that exhaustion is *not* required, this Court can, and should, recognize that exhaustion is appropriate and necessary under basic principles of international (and national) law.

CONCLUSION

For the foregoing reasons, and those stated in the petition and reply brief, the petition for a writ of certiorari should be granted.

Date: June 6, 2011

Respectfully submitted,

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